No. 20-1616

In the United States Court of Appeals for the Sixth Circuit

IN RE GENERAL MOTORS LLC; GENERAL MOTORS COMPANY

Appeal from the U.S. District Court
for the Eastern District of Michigan
No. 19-cv-13429 (Hon. Paul D. Borman)

FCA Defendants' Opposition to General Motors' Emergency Petition for Writ of Mandamus

Thomas W. Cranmer
Matthew P. Allen
MILLER, CANFIELD, PADDOCK & STONE, PLC
840 West Long Lake Road,
Suite 150
Troy, Michigan 48098-6358
Tel: (248) 879-2000

Steven L. Holley
Matthew J. Porpora
(admission forthcoming)
Jacob E. Cohen
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Tel: (212) 558-4000

Counsel for Respondents FCA US LLC and Fiat Chrysler Automobiles N.V.

June 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-1616 Case Name: In re General Motors LLC

Name of counsel: Steven L. Holley

Pursuant to 6th Cir. R. 26.1, FCA US LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Parent Corporation/Affiliate Name: Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company. Relationship with Named Party: Named Party is a wholly owned subsidiary of FCA North America Holdings LLC, a Delaware limited liability company, which is wholly owned by FCA Holdco B.V., a company incorporated under the laws of the Netherlands, and which, in turn, is wholly owned by Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company with its principal executive offices in London, United Kingdom.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Parent Corporation/Affiliate Name: Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company. Nature of Financial Interest: Named Party is a wholly owned subsidiary of FCA North America Holdings LLC, a Delaware limited liability company, which is wholly owned by FCA Holdco B.V., a company incorporated under the laws of the Netherlands, and which, in turn, is wholly owned by Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company with its principal executive offices in London, United Kingdom.

CERTIFICATE OF SERVICE

I certify that on June 29, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Steven L. Holley
125 Broad Street
New York, NY 10004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-1616 Case Name: In re General Motors LLC

Name of counsel: Steven L. Holley

Pursuant to 6th Cir. R. 26.1, Fiat Chrysler Automobiles N.V.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Parent Corporation/Affiliate Name: Exor N.V., Ferrari N.V., CNH Industrial N.V., and Juventus Football Club, all of which are publicly traded companies.

Relationship with Named Party: Exor N.V. owns ten percent or more of the stock of Fiat Chrysler Automobiles N.V. In addition, Exor N.V. controls Ferrari, CNH Industrial, and Juventus Football Club.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Parent Corporation/Affiliate Name: Exor N.V., Ferrari N.V., CNH Industrial N.V., and Juventus Football Club, all of which are publicly traded companies.

Nature of Financial Interest: Exor N.V. owns ten percent or more of the stock of Fiat Chrysler Automobiles N.V. In addition, Exor N.V. controls Ferrari, CNH Industrial, and Juventus Football Club.

CERTIFICATE OF SERVICE

I certify that on June 29, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Steven L. Holley
125 Broad Street
New York, NY 10004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

STATEMENT REGARDING JURISDICTION

FCA US LLC and Fiat Chrysler Automobiles N.V. (collectively, "FCA") do not dispute that this Court has jurisdiction to consider the petition of General Motors LLC and General Motors Company (collectively, "GM") under the All Writs Act, 28 U.S.C. § 1651(a), but disagrees with GM's assertion that its petition for a writ of mandamus is appropriate in the circumstances or that there is any basis for granting it.

STATEMENT OF ISSUES

1. Should this Court grant GM's extraordinary petition for a writ of mandamus and reassign the case to a different district judge because Judge Borman ordered the chief executive officers ("CEOs") of FCA and GM to meet face-to-face to explore whether they can resolve this case, which is the sort of effort to promote settlement in which district courts routinely engage?

2. Should this Court grant GM's extraordinary petition for a writ of mandamus and reassign the case to a different district judge—even though GM expressly sought to have the case assigned to Judge Borman when it filed its Complaint—because GM is upset that Judge Borman has not ruled in GM's favor on certain procedural issues and because he questioned some of GM's positions during oral argument on FCA's motions to dismiss?

STATEMENT OF THE CASE

GM filed this extraordinary petition for a writ of mandamus seeking reassignment of the case to a different district judge just three days after oral argument on FCA's motions to dismiss, at the end of which the district judge expressed concern about extensive resources of the parties being devoted to a case of dubious merit, and ordered the parties to meet to explore potential resolution of their dispute. Courts plainly have discretion to direct parties to attempt to settle a case, and they routinely do so. For example, this Court often directs parties to explore settlement before briefing on an appeal even begins. *See* 6th Cir. R. 33(b). Judge Borman's order that the parties explore settlement in no way warrants reproach, let alone the extreme sanction of having him removed from the case, which can be justified only where a court has plainly abused its power. GM may be unhappy about questions Judge Borman posed during oral argument that bore upon the validity of GM's claims—claims FCA believes are wholly meritless—but asking tough questions is a court's mandate; it is hardly grounds for a judge to be removed from a case.

GM's effort to have this case taken away from Judge Borman is particularly remarkable given that GM expressly requested that this case be assigned to him at the start. GM incorrectly asserts that the case was "randomly assigned to Judge Borman" by sheer "coincidenc[e]" (Pet. 6); in reality, GM marked the case as related

to certain criminal cases over which Judge Borman is presiding that relate to the same general subject matter as GM's claims in this case.[1] Given that GM apparently believed it was a strategic advantage to have the judge handling those cases handle this case as well, GM should not be permitted now to complain that that judge has turned out to be less hospitable to GM's claims than GM anticipated. Parties are not permitted to engage in such judge shopping.

GM apparently is worried that Judge Borman will dismiss its claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on the strength of FCA's motions to dismiss and on what transpired at oral argument. But if that happens, GM has a perfectly adequate remedy. GM can appeal that dismissal to this Court, if and when it occurs. GM is not entitled to the "extraordinary remedy" of mandamus in the interim. *In re Nat'l Prescription Opiate Litig.*, 2019 WL 7482137, at *1 (6th Cir. Oct. 10, 2019).

Although GM's petition is ostensibly directed at Judge Borman's decision to direct the CEOs of GM and FCA to meet face-to-face to explore whether a settlement of this RICO case is feasible, that benign order—the sort which district courts all over the country issue on a routine basis—cannot be what has GM so agitated. In fact, Judge Borman has since amended his order to clarify that counsel may attend

[1] *See* Complaint Docket Text, R.1 ("Possible companion case(s): Eastern District of Michigan, 17-cr-20406-PDB-RSW, Judge Paul D. Borman").

both the "in-person meeting" and the subsequent court conference. (Amended Order, R.78, PageID#2934.) Though this clarification eliminates GM's concerns about exclusion of counsel, GM nonetheless persists in arguing that reassignment of the case is required. (6/27/2020 Letter, ECF#4.) Judge Borman has now made clear that the parties' report to him concerning their settlement discussion "will address a single question to GM's CEO, Mary Barra, and to FCA's CEO, Michael Manley; 'Have you resolved this case?' 'Yes' or 'No.' No further elaborations or statements by CEO Mary Barra or CEO Michael Manley will be requested, or permitted." (Order, R.79, PageID#2935.) There is now no conceivable basis for the extraordinary relief sought by GM.

What GM is really upset about is that Judge Borman's questions at oral argument suggested that he is subjecting RICO claims brought by an economic competitor to precisely the sort of scrutiny that courts are supposed to apply to such claims at the motion to dismiss stage. While GM seeks to paint it as inexplicable, district courts have every right to ask probing questions of RICO plaintiffs to ensure that they are not seeking treble damages for purported injuries that were not directly caused by a pattern of racketeering activity.

As Judge Borman may well conclude if GM is unsuccessful in usurping his authority to decide the pending motions to dismiss, the claims being pursued by GM in this case bear no resemblance to what Congress had in mind in enacting RICO.

Rather than plausibly alleging that the United Auto Workers ("UAW") is a criminal enterprise controlled by FCA, GM contends that $1.5 million in alleged "prohibited payments" under Section 302 of the Labor Management Relations Act directly inflicted billions of dollars in damages on GM in the form of increased labor costs.[2] But there is nothing in GM's 95-page Complaint directly tying the alleged prohibited payments to any impact on GM, which is unsurprising given that GM is mentioned nowhere in indictments, plea agreements and sentencing memoranda on which that Complaint is based.

In other words, GM's own Complaint establishes that it was, at most, a mere bystander with regard to the alleged prohibited payments, not the most directly injured party, which is what GM needs to be in order to meet RICO's stringent proximate cause requirement. As the Supreme Court has made clear, RICO authorizes civil actions only by "[t]he direct victim of th[e] [alleged] conduct"—meaning that persons who claim to have incurred harm "beyond the first step" in the causal chain cannot assert a RICO claim. *Hemi Grp., LLC* v. *City of N.Y.*, 559 U.S. 1, 10 (2010). Removing a district judge from a case merely for suggesting at oral

[2] While FCA acknowledges that certain former UAW employees and certain former FCA employees improperly used funds belonging to the National Training Center ("NTC") to purchase luxury items for their own personal use, and that those individuals have been indicted and pled guilty as a result of their misconduct, FCA denies that it either directed or approved the alleged prohibited payments.

argument that GM's Complaint needs to satisfy this standard would be extraordinary and a direct affront to the rule of law.

GM's petition for writ of mandamus should be denied.

GM'S ALLEGATIONS AND CLAIMS

GM brought this action on November 20, 2019, asserting RICO claims under federal law and unfair competition and civil conspiracy claims under Michigan common law, and seeking "billions of dollars" in damages. (Compl. ¶ 178, R.1, PageID#90.) GM posits two self-contradictory theories as to how the alleged improper payments to certain former UAW employees allegedly injured GM.

First, GM alleges that FCA "illegally purchased" certain "benefits, concessions, and advantages" from the UAW, "without regard to the interests of UAW membership." (*Id.* ¶¶ 6, 71, PageID##7, 36.) GM then asserts in conclusory terms that "FCA ensured that while these special advantages were conferred on FCA, the same or similar advantages were not provided to at least GM." (*Id.* ¶ 71, PageID#37.)

Second, and with no acknowledgement of the inherent contradiction, GM posits that FCA made *concessions to the UAW* during negotiation of the 2015 collective bargaining agreement, which the UAW then extracted from GM through so-called "pattern bargaining," all in an attempt by FCA to "force a merger" between FCA and GM. (*Id.* ¶ 7, PageID#7-8.) GM never attempts to explain why FCA

would want to saddle GM (let alone itself) with higher labor costs if FCA's ultimate goal was to acquire GM and run the combined company on a profitable basis.

STANDARD OF REVIEW

A writ of mandamus is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney* v. *Dist. Court*, 542 U.S. 367, 380 (2004). As "one of 'the most potent weapons in the judicial arsenal,'" *id.*, the petitioner "must (1) have no other adequate means of obtaining relief, (2) demonstrate a right to issuance that is clear and indisputable, and (3) show that issuance of the writ is appropriate under the circumstances." *In re Doe*, 793 F. App'x 415, 416 (6th Cir. 2020). None of those elements are even remotely met here.

Granting a writ of mandamus is not something courts of appeals do lightly. Rather, "mandamus should issue only in 'exceptional circumstances' involving a 'judicial usurpation of power' or a 'clear abuse of discretion.'" *In re Nat'l Prescription Opiate Litig.*, 783 F. App'x 537, 539 (6th Cir. 2019). Moreover, "because mandamus is a discretionary remedy," this Court can decline to issue a writ of mandamus if it concludes that doing so would not be "appropriate under the circumstances," even if GM had established—which it plainly has not—that it is "clearly and indisputably entitled" to such relief. *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 437 (6th Cir. 2009) (alterations omitted).

ARGUMENT

I. Judge Borman's efforts to promote a settlement do not warrant the "extraordinary" remedy of mandamus.

By GM's own account, oral argument on FCA's motions to dismiss did not go well for GM or its counsel. (Pet. 7-8.) Judge Borman expressed considerable skepticism about the merits of GM's RICO claims, which rest on GM's argument that GM—not rank-and-file UAW members—was the party most directly injured by the alleged prohibited payments. (Tr. 32-48, R.75, PageID##2891-2907.) GM does not dispute that Judge Borman had the discretion to dismiss GM's Complaint from the bench following argument on FCA's motions to dismiss. Yet, instead of doing so, Judge Borman took the motions "under advisement" (Order 1, R.74, PageID#2856), and ordered the CEOs of FCA and GM to "meet face-to-face, in good faith, and with good will, to resolve this huge legal diversion," which Judge Borman correctly noted would entail "significant time-consuming efforts" on behalf of both parties "if it goes forward" (*id.* at 3, PageID#2858) (emphasis in original). Judge Borman also ordered the parties to report to him "the results of [their] discussions" on July 1, 2020. (*Id.* at 4, PageID#2859.)

There is nothing remarkable about a district judge telling the parties to explore, at an early stage of a litigation, whether settlement is feasible. "Judges in complex litigation are encouraged to pursue and facilitate settlement early in a variety of ways." *Nat'l Prescription Opiate*, 2019 WL 7482137, at *3. As this Court

has expressly held, "there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *Does 1-2* v. *Deja Vu Servs., Inc.*, 925 F.3d 886, 899 (6th Cir. 2019). Accordingly, "[t]he Federal Rules of Civil Procedure provide tools to manage a busy docket, including the valuable tool of encouraging parties to settle when appropriate." *In re Univ. of Mich.*, 936 F.3d 460, 463 (6th Cir. 2019) (citing Fed. R. Civ. P. 16).

One of those tools is the ability to order the parties themselves (not just their counsel) to participate in settlement discussions. *See* Fed. R. Civ. P. 16(c)(1) ("[T]he court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."); *Univ. of Mich.*, 936 F.3d at 464 ("The Federal Rules generally allow a district court to order someone with settlement authority to attend a settlement conference."). Local Rule 16.6 for the Eastern District of Michigan explicitly provides that a district judge "may order a settlement conference to be held before that judge," "may require parties to be present," and "[f]or parties that are not natural persons, the court may require a natural person representing that party who possesses ultimate settlement authority to attend in person." E.D. Mich. L.R. 16.6.

GM admits (as it must) that "the district court may urge the parties to settle if it believes settlement would be expedient" (Pet. 17), so GM tries instead to accuse

Judge Borman of improperly "coercing" a settlement. (Pet. 18.) To support that irresponsible accusation, GM pieces together snippets of Judge Borman's order to create the misleading impression that Judge Borman "affirmatively ordered the two CEOs to '*reach a sensible resolution*.'" (Pet. 18 (quoting Order 3, R.74, PageID#2858)). In fact, Judge Borman ordered the CEOs to meet "in good faith, and with good will to resolve" the litigation. (Order 3, R.74, PageID#2858.) Judge Borman's June 27 Order reiterates that he asked the parties only to "consider a resolution of this case." (Amended Order, R.78, PageID#2934.) That is not coercion. As this Court held in *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974), while "no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable," a party to a case cannot "refuse a lawful order to attend such a conference to discuss the matter."

GM next takes issue with Judge Borman's order that GM's CEO, Mary Barra, represent GM in a good faith settlement discussion with FCA's CEO, Michael Manley, and report back to the district court on the results of those discussions. (Pet. 20-22.) GM relies heavily on *In re University of Michigan*, 936 F.3d 460 (6th Cir. 2019), in arguing that Judge Borman abused his discretion in this regard, but GM ignores key details of the holding in that case which makes it inapposite here. In *University of Michigan*, this Court held that a district judge abused his discretion by demanding that the University President, "a high-ranking state official," attend a

public court settlement conference to "'explain' a state policy 'to the media, to the public, and perhaps most importantly to the faculty and the students' in a federal court." *Id.* at 465. In so holding, this Court recognized that while the "the Federal Rules generally allow a district court to order someone with settlement authority to attend a settlement conference," that general power is "more limited when it comes to government actors," who often lack unilateral authority to settle on behalf of the state, *id.* at 464, and that "federalism and separation-of-powers principles counsel strongly against recognizing such a power," *id.* at 465. Moreover, the district court judge's insistence that the University President attend the conference was based not on the judge's "desire to settle the case," but on his belief that "the president had a duty to explain University policy to his constituents." *Id.* at 464. Indeed, the University "offered the district judge a representative with full settlement authority," but the judge "refused" that offer. *Id.*

This case is entirely different. The parties are not governmental agencies but two private companies, and the district court is not demanding anything other than that GM's CEO engage in good faith efforts to explore a settlement. GM seems to object to the entire concept of settlement discussions at this stage of the litigation, but that is not for GM to decide.

Finally, GM's objection to Judge Borman's order on the grounds that it did not permit the parties' counsel to participate in the private settlement negotiations or

the report to the Court is now moot. (Pet. 19.) On June 27, Judge Borman amended his June 23 order "to permit an attorney to accompany GM's CEO Mary Barra, and an attorney to accompany FCA's CEO Michael Manley to their private in-person meeting to consider a resolution of this case, and at their subsequent Zoom report to the Court." (Amended Order, R.78, PageID#2934.) "[M]andamus relief is clearly inappropriate as the district court corrected its own error." *In re Life Inv'rs Ins. Co. of Am.*, 589 F.3d 319, 325 (6th Cir. 2009). Given that the meeting between the GM and FCA CEOs has not yet occurred, GM has suffered no conceivable harm.

II. GM fails to identify any "extraordinary" circumstances warranting reassignment.

When GM filed this action, it requested that the case be assigned to Judge Borman given his experience with matters addressed in the Complaint. That knowledge was gained by presiding over criminal cases arising out of the alleged prohibited payments—cases that have resulted in "more than a dozen guilty pleas." (Pet. 5.) GM apparently believed that Judge Borman's experience in those cases would make him amenable to expanding the reach of civil RICO, but GM now appears to regret its decision, upset that its counsel was "barrag[ed]" with questions at the oral argument on FCA's motions to dismiss. (Pet. 30.) While those questions may suggest doubt that GM—as opposed to rank-and-file members of the UAW—is the most direct victim of the alleged prohibited payments, neither that, nor GM's other criticisms of Judge Borman's conduct, remotely support GM's bold contention

that Judge Borman has "compromise[d] 'the appearance of justice'" in a manner that warrants the "extraordinary remedy" of "reassignment." (Pet. 30-31.)[3]

Indeed, "[r]eassignment is an 'extraordinary power' that should 'rarely be invoked.'" *Brent* v. *Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 702 (6th Cir. 2018). In determining whether reassignment is necessary, this Court considers:

1. "whether the original judge would reasonably be expected to have substantial difficulty in putting out of his or her mind previously expressed views or findings";

2. "whether reassignment is advisable to preserve the appearance of justice"; and

3. "whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Id.

There is "the greatest reluctance" to exercise the "extraordinary power" of taking a case away from a district judge, *Solomon* v. *United States*, 467 F.3d 928, 935 (6th Cir. 2006), particularly when, as here, a case is assigned to an "experienced

[3] Judge Borman certainly did not "compromise 'the appearance of justice'" by "dismiss[ing] all of GM's state-law claims in a two-page order that did not discuss the merits at all." (Pet. 30.) This Court routinely affirms the dismissal of pendant state law claims without discussing the merits. *E.g.*, *Winkler* v. *Madison Cty.*, 893 F.3d 877, 905 (6th Cir. 2018); *see also United Mine Workers* v. *Gibbs*, 383 U.S. 715, 727 (1966). If GM disagrees with Judge Borman's reasoning for dismissing GM's state law claims, it has remedies at its disposal, including moving for reconsideration, seeking an interlocutory appeal, or appealing the dismissal in the ordinary course after entry of final judgment.

and fair-minded judge" with decades of experience. *United States* v. *Daniels*, 616 F. App'x 782, 785-86 (6th Cir. 2015).

A. Judge Borman did not improperly prejudge the case by asking GM's counsel tough questions during oral argument.

GM appears primarily to be offended that, during the oral argument on FCA's motions to dismiss, Judge Borman asked few questions of FCA's counsel but asked GM's counsel "more than two dozen questions." (Pet. 7-8.) But that is not out of the ordinary—district courts are entitled to form preliminary views based on their reading of the parties' briefs,[4] and there is no requirement that each side receive the same number of questions during oral argument. Of course, Judge Borman could have elected to decide the motions to dismiss on the papers without *any* oral argument, so the notion that an imbalance in questions asked during oral argument undermines the appearance of justice is preposterous.[5]

---

[4] Indeed, in the Ninth Circuit, district courts often issue "tentative ruling[s]" "[p]rior to oral argument," in which "the Court state[s] its tentative rulings and order[s] that counsel be prepared to address particular issues." *Willis* v. *Donahoe*, 2013 WL 6199176, at *1 (N.D. Cal. Nov. 26, 2013). This practice in no way reflects that the judge is biased against a party or has improperly "prejudged" the motion.

[5] GM omits from its petition that Judge Borman allowed GM's counsel to continue argument well beyond the time limit initially established by the court precisely "because I had a lot of questions here." (Tr. 48-49, R.75, PageID##2907-08.) Judge Borman did so "in fairness," given that he "didn't have questions" for FCA's counsel. (*Id.*) Thus, Judge Borman did nothing to prevent or constrain GM's counsel from presenting his full argument.

The Supreme Court has directed district courts to be skeptical of RICO "claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws." *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006); *see Empire Merchants, LLC* v. *Reliable Churchill LLLP*, 902 F.3d 132, 144 (2d Cir. 2018) (same). GM is an economic competitor of FCA, and the gravamen of its Complaint is that the alleged prohibited payments permitted FCA to "more effectively compete and thrive against GM." (Compl. ¶ 5, R.1, PageID##6-7.) Judge Borman cannot be taken off this case for doing precisely what the Supreme Court instructed him to do.

Judge Borman asked GM's counsel some difficult questions during oral argument on fully-briefed motions. That fact cannot be grounds for claiming that Judge Borman improperly "*prejudged* the merits." (Pet. 32 (emphasis added).) If it were, virtually any questioning during oral argument could give rise to such a challenge. In short, GM's "bruised feelings" about facing tough questions cannot be a valid basis for replacing the judge.

After all, the very purpose of deciding a motion to dismiss is to *judge the merits* of the claim. *See Pratt* v. *Ventas, Inc.*, 365 F.3d 514, 522 (6th Cir. 2004) ("dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *is a 'judgment on the merits*'") (emphasis added). As the First Circuit noted in *Candelario Del Moral* v. *UBS Financial Services Inc. of P.R.*, "judging is all about

making judgments, obviously," and thus, any "problems with the views [district judges] form in slogging through cases typically do not provide 'a sound basis either for required recusal or for directing that a different judge be assigned on remand.'" 699 F.3d 93, 106-07 (1st Cir. 2012). GM may be reading tea leaves and is worried that its RICO claims are at risk of being dismissed, but that is not grounds for seeking reassignment. If the rule were otherwise, every litigant who had an oral argument that did not go as well as she had hoped would immediately petition this Court for a new judge.

As it did in responding to FCA's motions to dismiss, GM insists that the validity of its RICO claims cannot be questioned because GM quotes from "various criminal pleas" in its Complaint. (Pet. 31; *see also id.* at 1, 5, 6, 9.) That is a complete non-sequitur. Just because certain former FCA and UAW employees have admitted to engaging in criminal conduct does not mean that the conduct can be imputed to FCA or, more importantly, that GM suffered any direct injury as a result of that conduct, which is what GM must show in order for its RICO claims to survive. *See Hemi*, 559 U.S. at 9-11 (RICO requires a "'direct causal connection' between the predicate offense and the alleged harm"; "[a] link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient."). That Judge Borman pressed GM's counsel about whether GM has adequately pled that the alleged prohibited payments were the "but for" and proximate cause of GM's alleged injury is hardly

evidence that he had "second-guessed Congress' judgment in providing a federal cause of action." (Pet. 32.) Under GM's view of the world, any district judge that even calls into question the validity of GM's RICO claims is by definition biased and should be removed from the case. That cannot be right.

An example of the lengths GM is prepared to go in unfairly attacking Judge Borman is its unsupported assertion that the U.S. Department of Justice wrote in a sentencing memorandum that "Defendant Alphons Iacobelli agreed that he and others at FCA made illegal payments as part of 'a corporate policy to buy good relationships with UAW officials,' which they believed would lead to benefits, concessions, and advantages *over GM* in collective bargaining." (Pet. 6 (emphasis added).) In fact, the sentencing memorandum—like all of the other documents from the criminal cases on which GM relies—says not one word about GM.

GM is also wrong that "many (if not most)" of Judge Borman's questions at the oral argument on FCA's motions to dismiss had "nothing to do with the facts and claims." (Pet. 8.) Instead, nearly every question probed GM's failure to satisfy RICO's strict direct causation requirement. Indeed, GM cites only two examples of supposedly irrelevant questions, which were not irrelevant at all.

GM first claims that Judge Borman improperly questioned GM's counsel about the "'benefits' GM had received under 'the TARP rescue program,'" asserting that "[i]ssues regarding the 2008 financial crisis and its aftermath obviously are

unrelated to the sufficiency of GM's RICO allegations." (Pet. 8.) But GM itself devotes an entire section in its Complaint to how the "Financial Crisis Threaten[ed] U.S. Auto Industry" (Compl. ¶¶ 44-47, R.1, PageID##23-24), and accuses FCA of "win[ning] the support of the U.S. government in obtaining operational control, for no cash, over an iconic U.S. auto company, Chrysler Group LLC" (*id.* ¶ 2, PageID##4-5). GM cannot fault Judge Borman for asking about matters that GM chose to highlight in its Complaint.

As for GM's second example, whether GM knew of Alphons Iacobelli's involvement with the alleged prohibited payments when GM hired him after he left FCA in 2015 (Pet. 8) is directly relevant to one of the grounds on which FCA moved to dismiss the Complaint—that GM's claims are untimely. Had GM properly vetted Mr. Iacobelli by, for example, asking how he could afford his lavish spending, including the purchase of a Ferrari for hundreds of thousands of dollars, it could have learned about the alleged prohibited payments years before Mr. Iacobelli's indictment was unsealed. That bears directly on GM's efforts to avoid RICO's four-year statute of limitations.

B. Judge Borman did not improperly question "GM's motives in filing suit."

GM says Judge Borman should be reassigned because he "questioned GM's motives in filing suit" by referring to GM's RICO claims as a "nuclear option." (Pet. 2, 8.) GM itself, however, has described RICO as "the *litigation equivalent of*

a thermonuclear device" when finding itself a frequent defendant in RICO cases. GM Brief in *Chaney* v. *Berkshire Hathaway Inc., et al.*, No. 17-cv-989, ECF#60 at 4, 2017 WL 11140611 (D. Ariz. Sept. 8, 2017) (internal quotation omitted; emphasis added). This Court has made the same observation, explaining that "[a] civil RICO claim is an unusually potent weapon—the litigation equivalent of a thermonuclear device. For this reason, there is a strong temptation for plaintiffs to raise a RICO claim, even when the claim is obviously frivolous." *Bachi-Reffitt* v. *Reffitt*, 802 F. App'x 913, 919 (6th Cir. 2020) (quotation omitted).

It is baseless to contend that reassignment is warranted merely because Judge Borman acknowledged that a civil RICO action seeking billions of dollars in treble damages is "the litigation equivalent of a thermonuclear device," and therefore requires him to take "particular care" to "prevent[] abusive or vexatious treatment of defendants." *Miranda* v. *Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Again, GM should not be castigating Judge Borman for any comment he makes that might cast doubt on the validity of GM's RICO claims.

C. Judge Borman never said this case was a distraction from other cases on his docket.

GM claims Judge Borman "derided the whole matter was [*sic*] a distraction unworthy of the resources *of the court*." (Pet. 31-32 (emphasis added).) Judge Borman said no such thing. Instead, in ordering the parties to consider how they might resolve the case short of "years of contentious litigation," Judge Borman

reminded the parties that, "[i]f this case goes forward"—including "motion hearings, multiple-day depositions of large numbers of executives and former executives" and a "plethora . . . of experts"—it will "divert and consume the attention *of key GM and FCA executives* from their 'day jobs.'" (Order 2, R.74, PageID#2857 (emphasis added).)

Judge Borman was entitled to express concern about the "distraction" and "waste of time and resources" to the parties (Pet. 3) that inevitably will result from litigating a sprawling RICO case, especially one with all of the problems identified by FCA in its motions to dismiss. "[A] treble damages claim under RICO may treble the expense of the case as well as the stakes." *Mortell* v. *Mortell Co.*, 887 F.2d 1322, 1328 (7th Cir. 1989) (Easterbrook, J.). There was nothing improper about Judge Borman recognizing that the "avoidance of costly and time-consuming litigation" is precisely why there is a "policy favoring the settlement of disputes." *Therma-Scan, Inc.* v. *Thermoscan, Inc.*, 217 F.3d 414, 419 (6th Cir. 2000) (quotation omitted).

D. Staying discovery pending resolution of a motion to dismiss in a complex RICO case is standard practice, not evidence of bias.

GM speculates that Judge Borman must be biased against GM because he stayed discovery pending resolution of FCA's motions to dismiss, thereby deviating from his supposed "default" practice of allowing "discovery as a matter of course." (Pet. 6, 30.) But such stays in complex commercial cases are routine. As GM itself has observed, "a short stay of discovery to permit the Court to consider the merits of

a motion to dismiss" "is warranted" to "avoid the need for costly and time-consuming discovery," and will "'not prejudice . . . the opposing party' or unduly delay the action." GM brief in *Feliciano* v. *Gen. Motors LLC*, No. 14-cv-06374, ECF#19 at 2, 2014 WL 6629849 (S.D.N.Y. Oct. 22, 2014).

This Court has made clear that "there is no general right to discovery upon filing of the complaint," as the "very purpose of Fed. R. Civ. P. 12(b)(6) 'is to enable defendants to challenge the legal sufficiency of complaints *without subjecting themselves to discovery*.'" *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003) (emphasis added). This makes perfect sense: "'only a complaint that states a plausible claim for relief' can 'unlock the doors of discovery.'" *Bah* v. *Attorney Gen. of Tenn.*, 610 F. App'x 547, 553 (6th Cir. 2015); *see New Albany Tractor, Inc.* v. *Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011) ("The language of *Iqbal*, 'not entitled to discovery,' is binding on the lower federal courts.").

Indeed, if any case warranted a stay of discovery pending resolution of the motion to dismiss, this is it. GM initiated a case that not only is quintessentially "big"—GM propounded 55 discovery requests on FCA seeking a wide array of documents covering a period of *more than 10 years* (*see* Order Staying Discovery 3, R.55, PageID#1869)—but is predicated on claims that are fatally flawed. As the Seventh Circuit has explained, "RICO cases, like antitrust cases, are 'big' cases and

the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim." *Limestone Dev. Corp.* v. *Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008).

In light of the exorbitant expense imposed on defendants in responding to broad discovery requests in RICO cases (like the ones GM already has served on FCA), and the highly-damaging nature of RICO allegations (like the baseless ones GM has asserted against FCA), district courts in this Circuit routinely stay discovery pending resolution of a motion to dismiss RICO claims,[6] just as other courts across the country do.[7]

---

[6] *See Brown* v. *Tax Ease Lien Servicing, LLC*, 2015 WL 13674856, at *1 (W.D. Ky. July 27, 2015); *Miller* v. *Countrywide Home Loans*, 2010 WL 2246310, at *3 (S.D. Ohio June 4, 2010) (staying discovery and noting that alleged "RICO violations[] have the potential to place a discovery burden on the defendants"); *Melton* v. *Blankenship*, 2007 WL 9718925, at *2 (W.D. Tenn. Dec. 14, 2007) (finding "good cause to stay all discovery" when "the court [had] noted its concerns regarding the RICO claims").

[7] *E.g.*, *James* v. *Hunt*, 761 F. App'x 975, 981 (11th Cir. 2018); *Levy* v. *BASF Metals Ltd.*, 755 F. App'x 29, 31 (2d Cir. 2018); *Jarvis* v. *Regan*, 833 F.2d 149, 155 (9th Cir. 1987); *Lau* v. *Ambani*, 2017 WL 7693353, at *2 n.12 (E.D. Pa. Aug. 11, 2017); *Mortg. Resolution Servicing, LLC* v. *JPMorgan Chase Bank, N.A.*, 2016 WL 3906712, at *1 (S.D.N.Y. July 14, 2016); *Guajardo* v. *Martinez*, 2015 WL 12831683, at *2 (S.D. Tex. Dec. 22, 2015); *Sky Med. Supply Inc.* v. *SCS Support Claims Servs., Inc.*, 2013 WL 12373676, at *1 (E.D.N.Y. June 5, 2013); *Valverde* v. *Xclusive Staffing, Inc.*, 2017 WL 3866769, at *2 (D. Colo. Sept. 5, 2017); *Major, Lindsey & Africa, LLC* v. *Mahn*, 2010 WL 3959609, at *6 (S.D.N.Y. Sept. 7, 2010).

Accordingly, Judge Borman's denial of GM's request to commence wide-ranging discovery before FCA's motions to dismiss were decided is nothing like the circumstances in *Rorrer* v. *City of Stow*, 743 F.3d 1025 (6th Cir. 2014), cited by GM. (Pet. 29.) There, the district court issued a "one-sided order so severely limiting the number of witnesses that a plaintiff may call without any explanation or apparent rationale," and, significantly, "did not impose the same numerical limit on Defendants." *Rorrer*, 743 F.3d at 1049. This disparate treatment "appear[ed] to raise the possibility of bias or the appearance of lack of impartiality." *Id.* But Judge Borman did nothing to treat FCA and GM unequally—he said there would be no discovery for anyone until he decided the pending motions to dismiss. Nor did Judge Borman fail to provide "any explanation or apparent rationale" for staying discovery. *Id.* at 1049. Instead, he carefully explained his reasoning in a 5-page decision. (*See* Order Staying Discovery, R.55, PageID##1867-71.)

CONCLUSION

For the foregoing reasons, GM's petition for a writ of mandamus should be denied.

Respectfully submitted,

/s/ Steven L. Holley

Thomas W. Cranmer
Matthew P. Allen
MILLER, CANFIELD, PADDOCK & STONE, PLC
840 West Long Lake Road,
Suite 150
Troy, Michigan 48098-6358
Tel: (248) 879-2000
cranmer@millercanfield.com
allen@millercanfield.com

Steven L. Holley
Matthew J. Porpora
Jacob E. Cohen
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Tel: (212) 558-4000
holleys@sullcrom.com
porporam@sullcrom.com
cohenja@sullcrom.com

Counsel for Respondents FCA US LLC and Fiat Chrysler Automobiles N.V.

June 29, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because this brief contains 5,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New font.

/s/ Jacob E. Cohen
Jacob E. Cohen
Counsel for Respondents FCA US LLC and Fiat Chrysler Automobiles N.V.
Dated: June 29, 2020

CERTIFICATE OF SERVICE

I certify that on June 29, 2020, the foregoing brief was electronically filed with the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

/s/ Jacob E. Cohen
Jacob E. Cohen
Counsel for Respondents FCA US LLC and Fiat Chrysler Automobiles N.V.
Dated: June 29, 2020

ADDENDUM OF RELEVANT LOWER COURT DOCUMENTS

Record Entry No.	Description	Page ID Range
1	Complaint	1-95
31	GM's motion to commence early discovery	173-99
37	Iacobelli's opposition to GM's motion to commence early discovery	473-83
40	FCA's opposition to GM's motion to commence early discovery	519-45
41	FCA US's motion to dismiss the Complaint	764-830
42	FCA NV's motion to dismiss the Complaint	1325-48
49	GM's reply in support of its motion to commence early discovery	1507-18
50	Iacobelli's motion to dismiss the Complaint	1601-36
55	Order staying discovery	1867-71
59	GM's Opposition to FCA NV's motion to dismiss the Complaint	2159-75
64	GM's Opposition to FCA US's motion to dismiss the Complaint	2303-64
65	GM's Opposition to Iacobelli's motion to dismiss the Complaint	2573-2607
67	Iacobelli's reply in further support of his motion to dismiss	2719-30
68	FCA US's reply in further support of its motion to dismiss	2731-57
69	FCA NV's reply in further support of its motion to dismiss	2827-33
71	Order declining to exercise supplemental jurisdiction over GM's state law claims	2850-51
74	Order	2856-59

Record Entry No.	Description	Page ID Range
75	Transcript of oral argument on motions to dismiss	2860-2928
78	Amender Order	2934
79	Order	2935